2001

# Barbara June Flannery v. Jerold Frank Flannery : Brief of Respondent

Utah Supreme Court


LaMar Duncan; Attorney for Plaintiff.
Orrin G. Hatch and Andrew Grey Nokes; Attorney for Defendant and Respondent.

IN THE SUPREME COURT
OF THE STATE OF UTAH



BARBARA JUNE FLANNERY,
*Plaintiff and Appellant,*

- vs. -

JEROLD FRANK FLANNERY,
*Defendant and Respondent.*



Case No.
13896

# BRIEF OF DEFENDANT-RESPONDENT

In Response to an appeal from a judgement of the
Second Judicial District in and for Davis County
The Honorable Thornley K. Swan, Judge

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RULES CITED

52, 52(b), 54(a), 54(b), 60(b)(7)

TEXT CITED

114 A.L.R. 726

CASES CITED

IN THE SUPREME COURT
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BARBARA JUNE FLANNERY,
*Plaintiff and Appellant,*

-vs.-

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*Defendant and Respondent.*

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# BRIEF OF DEFENDANT-RESPONDENT

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## STATEMENT OF THE CASE

This is an action for divorce. The attorney for the Defendant-Respondent is redating the case due to the fact that the Brief of the Pliantiff-Appellant does not properly state some pertinent facts and includes other facts not pertinent to the appeal. At the outset it should be noted that the appeal is taken from a Decree of Divorce entered November 20, 1973 (TR-16) Not November 20, 1974 as stated in Plaintiff-Appellants Brief.

## DISPOSITION OF THE LOWER COURT

On November 20, 1973 (TR-16) the District Court of the Second Judicial District entered a Decree of Divorce in this matter dissolving the marriage of the parties, awarding Plaintiff-Appellant the custody of three minor children of the parties and awarding the Plaintiff-Appellant alimony and support money, equity on the home, certain securities and attorneys' fees. This Decree was entered upon Defendant's default in the matter based on the verbal agreement mentioned in the Trial Court's Order entered September 18, 1973 (TR-7) between Plaintiff-Appellant's attorney, and Defendant-Respondent, who, at this stage of the proceedings was not represented by counsel.

On February 21, 1974 (TR-20) upon motion of the Plaintiff-Appellant an Amendment to the Decree of Divorce was entered, modifying and amending the Decree of Divorce previously entered on November 20, 1973 (TR-16).

On March 13, 1974 filed a further Affidavit (TR-63) amending the previous affidavit stating the verbal agreement and stipulation between the attorney for the Plaintiff-Appellant the initial proceedings and upon which the Decree of Divorce entered November 20, 1973 (TR-16) was based.

On March 20, 1974, Orrin G. Hatch, the attorney for the Defendant-Respondent who had by this time become involved in the matter, filed an Affidavit of Defendant's Attorney (TR-26) to support his Motion (TR-28) to set aside the Decree of Divorce dated November 20, 1973 (TR-16) and amended February 21, 1973 (TR-20).

Thereupon, on March 20, 1974, the attorney for the Defendant-Respondent filed his Motion (TR-28) pursuant to Rule 60 (b) (7) requesting the Trial Court to set aside the Decree of Divorce November 20, 1973 as amended February 21, 1974 (TR-20) to allow the Defendant-Respondent to answer the complaint, or in the alternative, to further amend the Decree of Divorce in order that it would conform to the terms previously agreed upon between the parties. Hearing on this Motion was set for April 2, 1974 (TR-31) and was set for trial by order of the Trial Court (TR-60), and after a number of intermediate and supplementary motions, memoranda, and affidavits were filed and settlemenental negotiations between the parties and their attorneys failed, the matter ultimately came on for hearing on August 8, 1974 (TR-73,77,80).

On August 8, 1974 the matter was heard by the Trial Court with the parties and their attorneys present. Based upon stipulation of the parties as set forth in the Transcript of said Hearing (TR-80) and Order

entered by this court dated August 8, 1974 (TR-73) an Order Amending Decree of Divorce (TR-77) previously entered (TR-16) and Amended (TR-20) was entered in the matter. It is from this Amended Decree that Plaintiff-Appellant Appeals.

The attorney for the Defendant-Respondent does not think it necessary to further restate Disposition of the Lower Court Section of the Plaintiff-Appellant's Brief (page 1), however, we are constrained to write the Courts attention to the following error in that Section of the Brief:

1. On page 2 of said Brief in the second paragraph it is stated, Thereafter, and on the 20th day of March 1974, at a time when the Decree had become absolute and final . . . ." The Defendant-Respondent contends, and will hereinafter prove that the said Decree had not become final at this time.

2. On page 3 of the said Brief in the second Paragraph states in part, "on the 8th day of August, 1974, (TR-74) at which time the Court arbitrarily and with no reason at all reduced the award of attorneys' fees . . ." The Defendant-Respondent contends, and will herinafter prove that the stipulation made before the Trial Court (TR-80) was the free and voluntary act of the parties and their respective attorneys and was arrived at in open court and based on the testimony of both the parties and their attorneys (TR-80).

## STATEMENT OF FACTS

The Defendant-Respondent finds no issue with the "STATEMENT OF FACTS" set forth in Plaintiff-Appellant's brief, except in the follwoing respects:

1. On page 6 the second paragraph the Brief states, "Later on

April 29, 1974, long after the Decree had become final . . . . ." As above stated, Defendant-Respondent contends that the Decree had not become final.

2. On page 6 in the same paragraph the Brief states: "Neverthe less, and without any reason whatsoever except the statement that the Defendant's business was slipping off, the Court reduced the amount....and modified the Decree....." As above stated, the Defendant-Respondent contends that the reduction was stipulated to an open court by the parties and their attorneys.

## REBUTTAL

### POINT I.

THE COURT DID INDEED HAVE JURISDICTION TO SET ASIDE AND AMEND THE DECREE SINCE IT DID NOT BECOME FINAL UNTIL JANUARY 21, 1975.

Rule 54 (a) of the Utah Code of Civic Procedure provides in part: "Judgement" as used in these rules includes a decree and any order from which an appeal lies.

Rule 54 (b) of the code provides in Part: When more than one claim for relief is presented in an action, a final judgement may be entered on one or more but less than all of the claims only on an express determination of the court that there is no just reason for delay and on an express direction for the entry of judgement. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims, shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims."

In the case at bar the complaint (TR-9) dated 20 August 1973 in paragraph 5 of the prayer thereof, the Plaintiff-Appellant asks the court to award one of the Defendant's automobiles free and clear of any incumbrances. Similarly, in the Findings of Fact and Conclusion of Law (TR-12) filed pursuant thereto at Paragraph 5 of the Conclusion of Law thereof it is stated:

> "That the Plaintiff is entitled to an award of one of the automobiles of the parties, the 1972 Pontiac Firebird . . . ."

However, in the Decree of Divorce (TR-16) there is no award made of the 1972 Pontiac Firebird or any other automobile. Hence, on 21 February 1974 an Amendment ot Decree of Divorce (TR-20) was entered amending the Decree of Divorce (TR-16) to; include the award to the Plaintiff-Appellant the aforesaid Pontiac automobile.

Under Rules 54(a) and 54(b), because of the Amendment to the Decree, the Decree could not become final or subject to motion for ruling therefrom under Rule 60(b) until up to three months after the judgement was entered. Hence at this point in the proceedings, the parties would have been allowed until 21 May 1974 to move the court for such relief. Prior to the Statutory period, and in fact on 20 March 1974, the Attorney of the Defendant-Respondent filed his Motion (TR-28) pursuant to Rule 60 (b)(7) for relief from the Decree of Divorce entered in the matter, and on 20 March 1974 the Trial Court issued an order (TR-47) requiring the Plaintiff-Appellant to show cause why the Decree of Divorce should not be modified as therein requested, said order based in part as stated in paragraph 7 thereof that; "7. The Divorce Decree was amended on the 21st day of February, 1974, and therefore the divorce is not yet final . . ."

For the foregoing reasons, the Argument set forth on Pages 7 and 8 Plaintiff-Appellant's Brief are moot and irrelevant, and since the

Decree of Divorce had not become final and was not a "final judgement" as argued, the Plaintiff-Appellant indeed does not and has not obtained any property right in the real and personal property involved.

The Utah Supreme Court has defined "final judgement" in State v. Booth, 21 Utah 88 (57 P.533) holding:

> "Where rights of parties in action, a distinct and independent branch thereof, are determined by the court, and nothing is reserved for future determination except what may be necessary to judgements enforcement, judgement is final."

Again in Fausett v. General Electric Contracts Corporation 100 Utah 259 (112 P 2nd 149) which holds:

> "Final appealable judgement is judgement upon issues joined in pleadings; the judgement that determines the right in controversy between the parties litigant."

And in North Point Consolidated Irrigation Co. v. Utah and Salt Lake Canal Co., 14 Utah 155, (46 P. 824) the Supreme Court hold:

> "Only jurisdiction that is conferred by Constitution (Art. VIII, Sec. 9) on Supreme Court is appeals from final judgements.

And in Attorney General v. Pomeroy, 93 Utah 426, (73 P. 2nd 1277) holds:

> "Final judgement is not a condition precedent to jurisdiction of Supreme Court, but is a condition precedent to review except in rare cases" and "Paramount policy of the law is to permit litigants to obtain review of rulings of trial courts, but there is also the rule that cases shall not be appealed piecemeal or in installments, and what constitutes final judgement will be determined by application of these two rules."

Thus it is clear and unequivocal based on the Utah Rules of Civil Procedure the position taken by the Plaintiff-Appellant is not supported by the statutes or the case law of Utah, and therefore cannot be upheld by the Supreme Court in this case.

POINT II.

THAT THE COURT INDEED AMENDED JURISDICTION TO ITS DECREE AS TO ANY AND ALL PROPERTY INVOLVED; AND, THEREFORE, NO INTEREST IN THE PROPERTY BECAME VESTED IN THE PLAINTIFF PRIOR TO THE ENTRY OF THE AMENDED DECREE OF DIVORCE OCTOBER 21, 1974 (TR-77).

Since the rebuttal of this point invloves the same argument as the Rebuttal to Point I, the argument is not restated here,but the court's attention is invited to the Argument and the Rebuttal of Point I as above set forth.

POINT III.

THE COURT AMENDED ITS DECREE OF NOVEMBER 20, 1973 (TR-16) ONLY AFTER AN EXAMINATION OF ALL THE EVIDENCE SUBMITTED BY THE PARTIES IN THE MATTER AND A FULL HEARING AND TRIAL ON THE MERITS OF THE CASE AND PURSUANT TO THE STIPULATION OF THE PARTIES AND THEIR ATTORNEYS MADE IN OPEN COURT ON AUGUST 8, 1973 (TR-80).

Rule 52 of the Utah Rules of Civil Procedure provides:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgement; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

All the requirements of this Rule were met by the trial court as indicated by the Order entered in the case dated 8 August, 1974

(TR-73) and the Order Amending Decree of Divorce entered in the matter on 21, October, 1974, (TR-77). Since these Orders were entered only after a full hearing on the merits of the case and based upon a stipulation of the parties and their attorneys during this hearing as set forth in the Transcript (TR-80) the Plaintiff-Appellant cannot successfully argue that the court made its Order and Decree "arbitrarily and with no reason whatsoever."

If the Amended Decree did not properly conform with the trial courts findings and the stipulation as aforesaid, then the Plaintiff-Appellant had his opportunity under Rule 52(b) to move for an Amendment of Decree. Even if the Amended Decree was improper in this respect as contended by the Plaintiff-Appellant, her attorney did not see fit to avail himself of the opportunity provided by Rule 52(b) to see an amendment of the Decree to make it conform to the stipulated Findings of Fact and Conclusions of Law.

Since he has not availed himself of the relief provided for in this Rule, he should certainly not be able to alter the court's decision through appeal.

In the case of Dalton vs. Stout, 87 Utah 39 (48 P. 2nd 425) the Utah Supreme Court held:

> "Where no assignment of error was filed in Supreme Court, judgment of trial court was affirmed without review."

Further, in Thompson vs. Hayes, 24 Utah 275 (67 P. 670) it was held:

> "All presumptions on appeal are in favor of trail court's judgment."
>
> And further:
>
> "Where there was no bill of exceptions or transcript of testimony,

findings of trial court were presumed to be supported by the evidence."

Sorenson v. Korsgaard, 83 Utah 177 (27 P. 2nd 439).
And again in Cullen vs. Harris, 27 Utah 4 (73 P. 1048) held: "Error committed by trial court in entering order denying motion to correct judgment could be reviewed on appeal from judgment only if properly preserved in record.

Therefore, it is abundantly clear that where there is no effort to amend a judgment which on appeal is alleged not to conform to the Findings and Conclusions of the trial court, then the appeal is not available to amend them.

## POINT IV.

THERE WAS INDEED CONSENT, AGREEMENT AND STIPULATION BETWEEN THE PARTIES AND THEIR ATTORNEYS WHEREBY THE COURT COULD FIND THAT THE PLAINTIFF-APPELLANT AGREED AND STIPULATED TO THE AMENDED DECREE ENTERED 21 OCTOBER 1974 (TR-77).

This stipulation is set out very clearly in the trial court (TR-80) the Order of 8 August, 1974 (TR-73) and the Amended Decree of Divorce entered 8 August, 1974 (TR-77).

Assuming that the Amended Decree was consistent with the Consent of the Plaintiff-Appellant, her attorney should have availed himself of the relief porvided by civil procedure 52(b) rather than by appeal as set forth in the Argument rebutting Point III. above.

## CONCLUSION

Defendant-Respondent submits that the trial court had jurisdiction to amend the Decree of Divorce; and, therefore, no property became vested in the Plaintiff-Appellant until the Amended Decree of Divorce, dated August 8, 1974 (TR-77) became final.

The forgoing demonstrates that the appeal herein is frivolous and without legal basis and therefore we submit that the Defendant-Respondent is entitled to an Order of this court dismissing the appeal of the Plaintiff-Appellant and affirming the amended Decree of Divorce dated August 8, 1973 (TR-77).

Respectfully submitted,
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*Attorneys for Defendant-Respondent.*